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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1571

ANDERSON FEDERATION OF TEACHERS, LOCAL 519,

Petitioner,

v.

SCHOOL CITY OF ANDERSON, A. George Harrison, C. DeVar Litten, Evelyn J. Byrum, Fred L. Matthews, John L. Childes, as members of the Board of Education of the School City of Anderson, Madison County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, School City of Anderson, Indiana, et al, submit that the Petition for Writ of Certiorari filed by Anderson Federation of Teachers, Local 519, should be denied, for the following reasons and authorities:

JURISDICTION

Petitioner's attempt to invoke this Court's jurisdiction under 28 U. S. Code Section 1257(3) is not well-founded.

This case does not concern the validity of any U. S. treaty or statute. It does not directly concern the validity of a state statute (the Indiana Anti-Injunction Statute) on the ground of its being repugnant to the Constitution or other U. S. laws since this question was never presented to either the trial court or the Indiana Supreme Court. Finally, this case does not involve any federal Constitutional or statutory right, privilege or immunity (under the 14th Amendment) since again, this question was never raised by Petitioner either at the trial court or on appeal to the Indiana Supreme Court. Respondents will cover this matter in the Argument.

QUESTIONS PRESENTED

Neither of the two constitutional questions here urged by Petitioners were ever presented to the Superior Court of Madison County or to the Indiana Supreme Court. The matter of whether the trial court had acted without a finding of possible substantial injury or interference with public health, safety and welfare in issuing the restraining order was never raised to the Indiana courts at any time in the proceedings.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

While Petitioners argued that the Indiana Anti-Injunction Statute (Indiana Acts of 1933, Chapter 12; Burns Indiana Annotated Statutes Sec. 40-501 to 40-514) did not apply to strikes by school teachers and other pub-

lic employees at both the trial and appeal stages of this case, they never alleged that the 14th Amendment to the U. S. Constitution would be abridged by refusing to permit teachers to utilize the provisions of said statute in either the trial court or on appeal.

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case as substantially correct, but would add the following facts to clarify that statement:

(1) The initial verified complaint for declaratory judgment and restraining order brought by respondents against Petitioner sought a determination, by the trial court, as to the validity of an existing strike or other sanctions by Petitioner's members who then were acting in violation of their individual contracts of employment for the 1967-1968 school year.

(2) Said initial verified complaint alleged an emergency and that irreparable injury would occur, jeopardizing the health, safety and welfare of the pupils in the school district, unless an immediate order be issued restraining the strike and other sanctions being conducted by Petitioner. On the basis of the verified petition, the temporary restraining order was issued on May 2, 1968, but the strike continued in defiance of that order, and a contempt citation against Petitioner was filed May 3, 1968.

(3) At the May 6, 1968 hearing on the contempt citation, 18 witnesses testified on behalf of respondents that a strike was being conducted in contravention to present contracts of employment, that bus drivers were refusing to cross picket lines and were discharging their student passengers in unsafe areas, and that the operation of the

school system was being disrupted. This evidence was uncontroverted and no evidence whatsoever was presented on behalf of Petitioner.

(4) At the conclusion of this evidence and before the Court had entered a finding, Petitioner voluntarily agreed to terminate the strike and comply with the Court's restraining order if the contempt citations against its individual members and officers were dismissed by respondents, leaving to the Court the determination of whether the Petitioner—Federation was in contempt of court. (R. 35-37)

(5) None of the "numerous procedural motions" filed by Petitioner in the trial court raised any federal or constitutional questions here presented.

(6) Thereafter, Petitioner appealed from the finding of contempt of court and during the entire course of appeal to the Indiana Supreme Court never raised any federal or constitutional question. The Petitioner did not raise any federal question until after the Indiana Supreme Court had rendered its decision on October 1, 1969. (251 N.E. 2d 15)

(7) In their petition for rehearing, filed October 19, 1969, Petitioner alleged that the decision denied it and its members due process and equal protection of the laws under the 14th Amendment of the U. S. Constitution, and Article 1, Section 12 of the Indiana Constitution. The Indiana Supreme Court denied rehearing, on January 19, 1970, without discussing these constitutional questions. (254 N.E. 2d 329)

ARGUMENT

1. No substantial federal questions are involved in this case.

Respondents will treat both questions presented by the Petitioner, concerning due process and equal protection under the 14th Amendment, at this point, since the same objections can be raised to each. In doing so, respondents would submit that by this court's rules, no jurisdictional basis exists to permit review of the Indiana Supreme Court's ruling. Petitioner failed to raise these questions before either the trial court or the Indiana Supreme Court, and these questions were neither briefed or argued by the parties, nor considered by the Indiana Supreme Court in its judgment. In Indiana, constitutional questions cannot be raised for the first time on appeal. *Williams v. Williams,* 217 Ind. 581, 29 N.E. 2d 557 (1940).

Petitioner seeks review of a judgment of the Indiana Supreme Court which affirmed the trial court's finding that Petitioner was guilty of contempt for violating a temporary restraining order. The rationale of the majority's ruling was that (1) the trial court was correct in finding the Petitioner in contempt and (2) that, contrary to Petitioner's contention, restraining orders may be issued against public employees, without notice, because Indiana's "Little Norris-LaGuardia Act", which prohibits such issuance, does not apply to disputes concerning public employees. (A-2) The majority relied upon *United States v. United Mine Workers,* 330 U.S. 258 (1947) and decisions from 16 other jurisdictions following the authority of that landmark case in deciding the above matters and in ruling that public employees do not have the right to strike.

A lengthy dissenting opinion raised a number of points and theoretical matters which had never been briefed or argued by any of the parties, or presented to either the trial or Supreme Court on the appeal (A-8). Included in the dissent was Justice DeBruler's opinion that the strike by Petitioner's members was "completely peaceful" (A-9), and that a blanket prohibition of strikes by public employees might violate the equal protection clause of the 14th Amendment. (A-13).

After the court's judgment of October 1, 1969, Petitioner filed its petition for rehearing, and alluded to the dissenting opinion with reference to due process of law and equal protection of law under the 14th Amendment and the Indiana Constitution. Even at this late point in the proceedings, Petitioner offered no authority for this contention. In denying rehearing neither the majority nor dissenting members of the Indiana Supreme Court alluded to these constitutional questions, directly or indirectly.

The lone mention of equal protection in the dissenting opinion of Justice DeBruler in no way indicates that the majority of the Indiana Supreme Court considered this federal question, or that the question was properly raised by petitioner. See Stern and Gressman, *Supreme Court Practice* (4th edition 1969), p. 327. It is the majority ruling which the court must consider, and this court reviews judgments, not opinions. See *Black v. Cutter Laboratories* 351 U.S. 292, 297 (1956); *McLaren vs. Fleischer* 256 U.S. 478 (1921).

This court has held repeatedly that an attempt to raise a federal question after judgment, by a petition for rehearing, does not furnish a basis for review by the U. S. Supreme Court, unless the state court actually entertains

the question and decides it. *Herndon vs. Georgia,* 295 U.S. 441, 445 (1935); *Radio Station WOW vs. Johnson,* 326 U.S. 120 (1945). When the highest state court has failed to pass upon a federal question it will be assumed that such omission was due to one of proper presentation in the state court unless the aggrieved party can show the contrary. *Street vs. New York,* 394 U.S. 576 (1969); *Bailey vs. Anderson,* 326 U.S. 203, 206 (1945).

Petitioner relies on the "surprise" doctrine of *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673 (1930) as its basis for jurisdiction. There this court ruled that a federal question involving the taking of property without due process of law was timely raised to the state court by a petition for rehearing, where the state court decision could not have been anticipated under the prior state law. Here, unlike the facts in *Brinkerhoff,* there were no prior Indiana decisions to mislead petitioner and all of the known authority presented on the questions argued was adverse to petitioner. Furthermore, petitioner knew that new Indiana law would be made by its appeal, that *United States v. United Mine Workers,* 330 U.S. 258 (1947) would probably be controlling, and that it failed to raise constitutional objections at its peril. Clearly, the court's ruling could have been anticipated in this case.

Thus, we submit that petitioner's attempt to raise these federal questions in its petition for rehearing, after the judgment of the Indiana court, was improper. *Hulbert v. Chicago,* 202 U.S. 275 (1906). See also *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969) *John v. Paulin,* 231 U.S. 583 (1914).

Furthermore, under Indiana practice, constitutional questions may not be raised for the first time by petition for rehearing. *City of Indianapolis v. Wynn,* 239 Ind. 567, 157

N.E. 2d 828, rehearing denied 159 N.E. 2d 572 (1959); *Gardner v. City of Bluffton* 173 Ind. 454, 90 N.E. 898 (1910). In Indiana, as in most states, petitions for rehearing may not raise new issues or constitutional questions not previously briefed or argued. *Kilgallen v. State,* 192 Ind. 531, 137 N.E. 178 (1922); *Harden v. State,* 246 Ind. 23, 201 N.E.2d 333, rehearing denied 202 N.E.2d 164 (1964).

Petitioner's failure to follow Indiana procedures in raising these constitutional questions precludes review by this court on these questions. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961). No amount of verbiage can hide the fact that the constitutional questions here sought to be raised by petitioner were never presented to the Indiana Supreme Court. A reading of the court's judgment and its opinion denying rehearing clearly indicates that it never considered these federal questions. Under all authority which respondents can find, this court should deny this petition for lack of jurisdiction.

2. The Indiana judgment was correct and is not in conflict with any other decisions.

Petitioner admits that no state or federal statute is being challenged here. Rather it attacks the Indiana judgment, based on the common law, that public employees do not have the right to strike. Yet petitioner offers no authority for its position, nor did it do so in its arguments to the Indiana Supreme Court. Respondents submit that there is no authority available to support the position of petitioner, and that all known authorities support the Indiana Supreme Court decision. Clearly, there is no conflict here with any decisions from other jurisdictions where these questions have been decided.

It has long been held, that under the common law, public employees had no right to strike. *Cleveland vs. Division 268 of Amalgamated Association,* 41 Ohio Op. 236, 90 N.E. 2d 711 (1949); *Board of Education v. New Jersey Education Association,* N. J. Sup., 247 A. 2d 867 (1968). This court has held that neither the Fourteenth Amendment nor the common law confers the absolute right to strike. *Dorchy vs. State of Kansas,* 272 U.S. 306, 311 (1926). States in governing their internal affairs may, consistent with the Fourteenth Amendment prohibit any strike or peaceful picketing if the prohibition is reasonably calculated to achieve a valid state policy. *International Brotherhood of Teamsters vs. Vogt,* 354 U. S. 284, reh. den. 354 U.S. 945 (1957). And, it is immaterial if this public policy has been expressed by the judiciary rather than the legislature. *Hughes vs. Superior Court of California,* 339 U.S. 460, 466 (1950). A state may prohibit all picketing if the state determines that picketing violates its public policy. *International Brotherhood of Teamsters v. Hanke,* 339 U. S. 470 (1950).

Even more explicitly, state courts have universally held that denying public employees the right to strike in no way denies them either due process of law or equal protection as defined by the Fourteenth Amendment. *In Re Block* 50 N.J. 494, 236 A.2d 589 (1967); *City of Manchester vs. Manchester Teachers Guild,* 100 N.H. 507, 131 A. 2d 59 (1957); *City of Detroit vs. Division 26 of Amalgamated Assoc., et al,* 51 N.W. 2d 228, 322 Mich. 237, appeal dismissed 344 U.S. 805, reh. den. 344 U.S. 882 (1952); *Minneapolis Fed. of Teachers vs. Obermeyer,* 147 N.W.2d 358, 275 Minn. 347 (1966).

Recent New York cases have affirmed the general rule that laws prohibiting strike by public employees do not

violate the equal protection or due process clauses of the Fourteenth Amendment, it being recognized that the Fourteenth Amendment permits states a wide scope of discretion in evaluating laws which affect some groups of citizens differently than others. *City of New York vs. DeLury*, 243 N.E.2d 128, 23 N.Y. 2d 175, 295 NYS 2d 901, application denied, 244 N.E. 2d 472, 23 N.Y. 2d 766, 296 N.Y.S. 2d 958; appeal dismissed 394 U.S. 455 (1968); *Rankin vs. Shanker*, 242 N.E.2d 802, 23 N.Y.2d 111 (1968); *State v. Fuller*, 296 N.Y.S. 2d 37, 31 A.D. 2d 71 (1968).

Actually, had petitioners properly raised these Fourteenth Amendment arguments, respondents could have replied by citing such cases as *Rodriguez vs. Sklar* (D.C. N.Y. 1968) 293 F. Supp. 1013, where the court stated that a district superintendent who closed down a school in support of an unlawful teachers strike, would be denying those children seeking to attend that school of equal protection of the laws, since those children would be treated differently from children in other parts of the state where schools were open. Respondents submit that the school children are entitled to equal protection, too.

Respondents object to petitioner's characterization of the strike as "completely peaceful" and not "substantially" disruptive of the continuance of the Anderson Public Schools. The evidence was to the contrary and clearly indicated that the strike was directly affecting the safety and welfare of the 17,000 school children in the system. The trial court found that an emergency existed requiring the issuance of a restraining order and the Indiana Supreme Court also noted that the pupils' safety was being jeopardized. (A-2) Petitioner never raised these objections or distinctions to the trial court below, or to the Indiana Supreme Court prior to its judgment. In fact, petitioner introduced no evidence at all at the contempt hearing. It is

now both fatally late and improper to raise this factual matter to this court. See Stern and Gressman, supra, p. 172.

While petitioner argues that this court should now consider whether there is a rational basis, consistent with the Fourteenth Amendment, for distinguishing between private and public employees it wholly failed to raise this question to the Indiana Supreme Court. If the decision of the Indiana Supreme Court was not sufficiently "discriminating" to suit petitioner (B-9), Petitioner surely did little to assist the court in its determination. Even now they offer no authority in support of this view. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955). The authority is again to the contrary. See *City of New York v. DeLury*, supra, 243 N.E. 2d at 133. The examples cited by petitioner are neither persuasive nor correct.[1]

Respondents agree with petitioners that "intelligent and sophisticated" legislation is needed for this difficult subject. However, we believe the state legislature should first act in this area, possibly obviating the need for further court action. From all of the authority cited herein and by the Indiana Supreme Court (A. 3-7), it would appear that no public employee anti-strike legislation, state or federal, has ever been declared unconstitutional. We submit that it is presumptuous for petitioner now to ask this court to provide guidelines for the Indiana legislature on this subject.

Thus, under all known authority, the Indiana judgment is correct and no valid authority to the contrary has been

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[1] The example on page 11, comparing Anderson's municipal utility employees to those of a private utility incorrectly states the Anderson gas utility is publicly owned. It is not. Also, the statute cited in note 5 does not apply to Anderson, but only to the City of Indianapolis.

offered by petitioner. Clearly, there is no need for this court to concern itself with the questions concerning due process and equal protection since there exists no conflict in the reported decisions.

3. Finally, petitioner argues (B. 11-13) that this court should "review and clarify" its landmark decision, *United States vs. United Mine Workers*, 330 U.S. 258 (1947). Respondents would point out to the court that this is the very first time in this entire litigation that petitioner has ever mentioned this case. It never sought at trial, on appeal, or in rehearing, to apprise the Indiana courts of its interpretation of, and views on, this case. Indeed, throughout this proceeding petitioner has acted as if it did not exist. Surely, it is too late now for petitioner to request that this court review the scope of this case, which has served as *the* basic authority concerning the applicability of the Norris-LaGuardia Act and its carbon copy state offspring to disputes involving public employees.

For this court to now restrict or modify the meaning of *United Mine Workers*, on the basis of the limited facts presented by this case, could only produce chaos in a body of settled federal and state decisions, casting doubt as to the validity of all existing and anticipated public employee legislation. In this troublesome area, further complications are not needed. *United States vs. United Mine Workers* needs no modification by this court. What is needed, respondents submit, is thoughtful legislation to fairly protect the rights of both public employees and the general public who support them with their tax dollars. This is a matter beyond the scope of this court and this petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM BYER
705 Anderson Bank Building
Anderson, Indiana 46016

ROBERT W. MILLER
601 Citizens Bank Building
Anderson, Indiana 46016

Counsel for Respondents.